IN THE

Supreme Court of the United States

October Term, 1978

No. 77-926

GERALDINE G. CANNON,

Petitioner,

v.

THE UNIVERSITY OF CHICAGO, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Reply Brief of Petitioner

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This reply is directed to the Joint Brief of Respondents The University of Chicago and Northwestern University.

The federal respondents support petitioner. Accordingly, no reply to the federal respondents is necessary, except to note disagreement with their limitation of the question presented. (Fed. Br. p. 54 n. 33). The schools' brief recognized that their argument is dependent upon the validity of petitioner's alternate claim against the federal respondents. (Jt.Br. pp. 9, 12, 50-51).

SUMMARY OF ARGUMENT

The schools' argument rests on five basic premises. None is sound.

I

First, the schools claim that elimination of an admission policy which excludes applicants to federally assisted medical schools on the basis of race or gender either interferes with academic freedom or could be more expertly accomplished by HEW than a federal court. (Jt.Br. pp. 6, 10-16). The first alternative misconceives the nature of the freedom necessary for academic institutions to pursue academic matters on academic grounds. The second alternative overlooks that the procedures required by this Court to eliminate the impact of such illegal discrimination upon an individual are uniquely judicial. Agency implementation necessarily would require judicial intervention to provide specifically enforceable injunctive relief pursuant to *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 802 (1973) and *Jurinko* v. *Weigand,* 414 U.S. 970 (1973), or agency proceedings for federal fund cutoff with attendant jeopardy to the rights of others. It is inconceivable that Congress meant to imply that agency "Russian roulette" with respect to federal funds should be the exclusive means of enforcing national policy specified in terms of individual rights in Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*

The schools again attempt to disparage the merits of petitioner's claim. (Jt.Br. pp. 10-16). However, they also concede that reliance on such matters would violate the standard established by this Court in *Conley* v. *Gibson,* 355 U.S. 41, 45-46 (1957). "The issue here is not whether there is merit to her claim. . . ." (Jt.Br. p. 11).

II

Second, the schools present excerpts from the legislative history of Title VI and Title IX to suggest that agency enforcement under section 2 was intended to be exclusive, subject to

judicial review under section 3. (Jt.Br. pp. 7-8, 16-32). Actually, as section 5 of each Title confirms, Congress pointedly rejected efforts to limit section 1 with the restrictions applicable to section 2. 42 U.S.C. § 2000d-4, 20 U.S.C. § 1685; 110 Cong. Rec. 5254, 5256, 13437, 13438. Moreover, Agency action under section 2 cannot provide an appropriate record for judicial review of agency action on individual rights. Aggrieved individuals cannot be parties to the agency proceedings. (Br. p. 11). Consequently, judicial review under section 3 is inadequate and not designed to protect or limit enforcement of the national policy expressed in terms of the rights of individuals in section 1 of each Title.

III

Third, the 1978 amendments of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the Age Discrimination Act of 1975, 42 U.S.C. § 6101 *et seq.,* enacted after the filing of petitioner's brief, P.L. 95-478 and P.L. 95-602, do not conflict with petitioner's arguments based on the legislative history of those Acts as suggested by the schools. (Jt.Br. pp. 41-42). On the contrary, the 1978 amendments of both laws support the position of petitioner that Title VI and the acts patterned thereon, Title IX, section 504 of the Rehabilitation Act and, after the 1978 amendment repealed the express limitation of enforcement to agency action, the Age Discrimination Act, all contemplate a private right of action for the victims of the discrimination prohibited by such laws and provide for attorney's fees to encourage and support such private actions. (Br. pp. 6-7, 9-10). *Cf.* Sec. 401(c), P.L. 95-478 and Conf.Rpt. 95-1618, Sept. 22, 1978, p. 87; 124 Cong. Rec. (daily ed. Sept. 20, 1978) S. 15590-91, 15593.

IV

Fourth, the schools purport to distinquish more than 200 prior cases involving both constitutional claims and statutory

claims under Title VI or Title IX, including *Lau* v. *Nichols*, 414 U.S. 563 (1963), on the grounds that those cases either were decided under 42 U.S.C. § 1983 and the Constitution (Jt.Br. pp. 41-48), or that the question of federal jurisdiction was not decided therein. (Jt.Br. pp. 8, 41). Such distinctions conflict with two of the most deeply rooted doctrines of this Court that: (i) constitutional decisions will be avoided when non-constitutional grounds may be dispositive, and (ii) federal jurisdiction cannot be waived. Moreover, the former distinction of *Lau* conflicts with the express rationale of all of the opinions for the unanimous Court. (Br. pp. 12, 19).

V

Fifth, the schools' argument based on primary jurisdiction or exhaustion misconceives the nature of the agency procedures adopted and available to implement Title VI and Title IX. (Jt.Br. pp. 9, 33-38). Such procedures are not designed to insure the individual rights specified in section 1 or to provide any reasonable basis for judicial review of agency action with respect to an individual aggrieved thereby. (Br. p. 11). Only the recipient of federal funds has the right to participate in the agency proceedings. The individual victim of discrimination is not a party, 45 C.F.R. § 81.23, and, at best, may be accorded the status of an *amicus curiae*, 45 C.F.R. § 81.22(a). Realistic time frames required for agency action generally are not suited to appropriate relief for aggrieved individuals. *Price* v. *Yale University*, Civ. No. N77-277 (D. Conn. Dec. 6, 1978), recently confirmed the position of petitioner and the federal respondents after a hearing on the specific issue of the adequacy of HEW's Title IX procedures for an individual victim of alleged sex discrimination. The schools' argument, nevertheless, is predicated expressly upon their assertion that, "Petitioner's remedy lies against HEW under her alternative claim for relief before this Court." (Jt.Br. pp. 9, 51).

REPLY ARGUMENT

1. The "Introduction" distorts academic freedom, petitioner's claim and the record.

Academic freedom does not include any right to discriminate in admission to federally assisted schools on the basis of race or sex in defiance of national policy. The schools claim the "underlying issue" or the "ultimate question" is: "Among the qualified, how does one choose?" (Jt.Br. pp. 6, 10). The answer is not as the schools suggest that, if petitioner prevails, "the trial court chooses." (Jt.Br. p. 15). Petitioner could respond that, if the schools prevail, the answer would be that, "HEW chooses." However, the only proper answer is, that "The schools must choose without illegal discrimination in defiance of national policy."

Reconsideration of an applicant without regard to a policy found to discriminate illegally on the basis of race or gender in accordance with the procedures specified by this Court in *McDonnell Douglas* and *Jurinko* would not turn a trial court or HEW into the admissions committee. In employment those cases did not turn the court or the agency into the hiring committee and did not permit interference with legitimate hiring criteria based upon *bona fide* business grounds. There is no reason to fear that the same procedures would lead to interference with the academic freedom of a school, state or private, "to determine for itself *on academic grounds* . . . who may be admitted to study."[1]

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[1] *Sweezy* v. *New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J. concurring) (emphasis added). Admission decisions based on race, gender, religion, ethnic or other non academic grounds reflect the very antithesis of academic freedom. *See* the letter dated November 14, 1922 from Judge Learned Hand to the chairman of the Committee of the Faculties of Harvard University concerning a proposal to introduce a quota system at Harvard, primarily for the purpose of limiting the proportion of undergraduate students from Jewish families. "The Spirit of Liberty", Papers and Addresses of

While the schools concede that the "issue here is not whether there is merit to her claim," (Jt.Br. p. 11), their brief first points to certain of petitioner's academic qualifications, and suggests she was not admitted—or would not be admitted—to medical school on those grounds. (Jt.Br. p. 10). Incredibly, their brief also denies the very existence of the published admission policies at issue. (Jt.Br. pp. 12 n.6, 36). The facts of record are contrary.[2]

First, the schools say that 2,000 applicants at The University of Chicago had better "academic qualifications." In fact, the published median college grade point average ("GPA") of

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Learned Hand edited by Irving Dilliard, Ch. 3 Christians and Jews (Alfred Knopf, New York, 1952).

[2] The factual record consists of the published data referred to in the verified complaints (App. pp. 3-21) and an affidavit (App. pp. 24-35) submitted in support of a motion for summary judgment by The University of Chicago which was not granted. No fact on which petitioner's claim was based, including the published age policy and the grade point and admission test data cited for petitioner and other applicants who were accepted, is contradicted by that conclusory affidavit as implied by the schools' brief. (Jt.Br. p. 10). Critical analysis of the affidavit may be found in the record. (U. Chi. Pltf. Ans. Mem. 9/2/75 pp. 29-35 and Pltf. Br. Reh. 12/20/76, App. pp. 1a-9a)

Repeated denial in the schools' brief (Jt.Br. pp. 11, 12 n. 6, 36) of the very existence of their own published age policies is flatly contradicted in the record (App. p. 7) and the public record. Such denials only highlight their concession that petitioner's application was rejected at the initial screening (Jt. Br. p. 13 n. 8) before meaningful evaluation of subjective factors was possible. (Jt.Br. pp. 13-14). Letters of recommendation were about the only evidence of subjective criteria available for initial screening. Petitioner's letters of recommendation were withheld from discovery by Chicago solely to preserve the school's obligation of confidentiality to the writers and with the stipulation that such letters were not the basis for denial of petitioner's application. (App. p. 7).

the 1973 entering class at Chicago was 3.55.[3] Hers was 3.63. (App. p. 7).

Second, Chicago acknowledges that 12% of its entering class had average total Medical College Admission Test ("MCAT") scores below 575.[4] Hers was 585. (App. p. 6).

Third, Chicago's Dean of Students conceded that his use of the term "academic qualifications" included the school's published statement that applicants "over 30 without advanced degrees . . . are not encouraged to apply."[5]

Finally, the schools say that petitioner's MCAT mathematical subtest score was in the lower 20% of the applicant group and that her science score was in the lower half. Apart from being factually wrong (she was in the 69th MCAT percentile on math and in the top third on science[6]), not one word either in the record or elsewhere suggests that respondents have ever, before this lawsuit, considered math scores as having any particularly significant bearing on medical school admissions.[7] Her combined GPA and MCAT science

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[3] "Medical School Admission Requirements 1975-76" Association of American Medical Colleges.

[4] *Id.*

[5] (App. pp. 7, 10). Data that 18.1% of the applicants and 18.3% of the entering classes at Chicago were women (Jt. Br. p. 11 n. 5) would be meaningful only in the circumstance—unlikely but certainly unproven—that the spectra of male and famale qualifications were almost identical. Actually, the aggregate percentages for 1972-75 conceal a decline in the acceptance percentage that was 3½ times as great for women as for men. (App. p. 26). Moreover, published admission policies which have a disproportionately adverse effect on women also must have a chilling effect on the number of women applicants.

[6] (App. p. 10) The data cited is ranked by Medical College Admissions Test Records, Iowa City, Iowa.

[7] The math score is of course included in the average total MCAT score.

score would have given her an approximately 70% chance of admission to medical school on these two criteria alone.[8]

The thrust of petitioner's complaint was not only that she was denied a *fair* chance at admission—she was denied *any* chance. Chicago and Northwestern University have published their selection procedures. Chicago's is of record. All applicants are preliminarily screened on the basis of their intellectual qualifications. "The student's scholastic record, along with his Medical College Admission Test scores, are used in this procedure." (App. p. 33). The survivors (10% at Chicago, 15% at Northwestern) are then interviewed.[9] Petitioner's GPA and MCAT placed her comfortably within the group to be interviewed under this procedure. She was not.

The averrments of the complaint and the stubborn facts are that petitioner was screened out at the initial level on the basis of her age. And as petitioner and others have demonstrated, "age" is, in practical effect, a euphemism for gender. (Br. pp. 5-6; App. pp. 7-14).

The schools argue that petitioner should be denied any opportunity to prove her claims because they may be contested and because her success on the jurisdictional issue may burden the courts with many other Title IX suits, some perhaps frivolous. (Jt.Br. pp. 10-13). Merely to suggest such a result, as did the court below, is to confirm the conflict with *Conley* v. *Gibson*, 355, U.S. 41 (1957). Difficult, frivolous and multitudinous litigation is not peculiar to Title IX.[10]

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[8] See the attached Table of Applicant—Acceptance Statistics. (App. p. A-1).

[9] *Op. Cit. supra* note 3.

[10] The very first element of a *prima facie* case under *McDonnell* and *Jurinko, supra,* is that the individual plaintiff be a member of a class against whom a policy or practice of the defendant discriminates on the basis of race or sex. It is difficult to imagine how any conscientious institution need contend with many such suits. The age rules in question occupy a substantial portion of the print space for the

The schools also claim, as did the court below, that Title IX should not be enforced as Title VI was enforced in *Lau* v. *Nichols*, 414 U.S. 563 (1974). The primary basis offered by the court below to reconcile its refusal to "stretch a statute by judicial interpretation" with the decision of this Court in *Lau*, namely an unprecedented jurisdictional preference for actions by "large groups", received only an oblique reference in the schools' brief. (Jt.Br. p. 46).[11] The alternative basis, express authorization in 42 U.S.C. § 1983, is flatly inconsistent with their view of the statutory scheme under the four factor analysis of *Cort* v. *Ash*, 422 U.S. 66 (1974) which also received cursory treatment. (Jt.Br. p. 32).

2. Argument under the statutory scheme overlooks Section 1983 and conflicts with the statutory terms and legislative history.

The schools claim that by providing administrative enforcement in the statutory scheme, Congress evidenced an intention to exclude judicial enforcement except by way of judicial review. Not a single congressman said so in the hearings, reports and debates on Title IX or Title VI. In fact, Congress declared that Title VI and Title IX "permit a judicial remedy through a private action." (Br. pp. 6, 10).

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selection factors published by each school. Only the recalcitrant need fear any volume of civil rights litigation. Hopefully, most schools will be alert to self examination in light of developments elsewhere.

There is no reason to expect that the courts would, let alone must, become involved in related decisions which might be required to carry out an order to eliminate the effect of a policy or practice found to discriminate in defiance of national policy. State schools have not been inundated by actions under 42 U.S.C. § 1983. Frivolous civil rights actions are subject to the imposition of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988.

[11] *Cf.* (Jt.Br. p. 46) and 559 F.2d 1074 (Pet.Cert. App. pp. A-16, n. 16, A-17).

Mere provision for some administrative procedure to implement congressional policy generally has not been held to evidence an intention to preclude a judicial remedy. Indeed, administrative enforcement also is available in the situations where a judicial remedy has been most frequently implied. Note, "Implying Civil Remedies from Federal Regulatory Statutes," 77 *Harv L. Rev.* 285 (1963). This Court required explicit and uncontradicted evidence of congressional intent to reject private actions in *National Railroad Passenger Corp.* [*Amtrak*] v. *National Association of Railroad Passengers,* 414 U.S. 453 (1974), *Securities Investor Protection Corp.* v. *Barbour,* 421 U.S. 412 (1975) and *Cort.*[12]

[12] One *amicus curiae* supporting the respondent schools (Br. Yale Univ. pp. 8-12) suggests, without support in precedent or logic, that the federal courts should be more hesitant to imply a private right of action in laws based on the spending power than in laws based upon the Commerce Clause or other constitutional powers of Congress. *Rosado* v. *Wyman,* 397 U.S. 397 (1970) is emphatically to the contrary notwithstanding the explanation that the decision rests on the Supremacy Clause. The legislation was an exercise of the spending power and the inherent related power, if not duty, of Congress to impose reasonable and constitutional conditions on the expenditure of federal funds. *McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316, 421 (1819) established that under the Necessary and Proper Clause all powers of Congress to legislate are limited only by the Constitution itself.

Neither the spending power nor any other power ought to be used to impose unconstitutional conditions. However, the application of that principle to this case is not apparent or articulated. A condition that federal funds not be used to support programs which discriminate on the basis of race or gender in defiance of national policy or that an enforceable contractual undertaking not to so discriminate be given, certainly is not unconstitutional or less worthy of the federal courts' assistance than conditions (including the same conditions) imposed under the Commerce Clause, the Fourteenth Amendment or some other power to legislate.

Logic and morality suggest that spending of the taxes levied upon all carries with it a greater than normal legal obligation on all branches of government to assure that national civil rights policy is

Most importantly, the schools' argument does not even attempt to account for the express authorization in 42 U.S.C. § 1983 of a private right of action by an individual under Title VI and Title IX in the case of state programs receiving federal financial assistance. The schools themselves elsewhere present exactly that argument in attempting to distinguish the more than 200 cases reported under Title VI and Title IX, including *Lau* and *Regents of the University of California* v. *Bakke,* 98 S. Ct. 2733 (1978). (Jt.Br. pp. 44-48).

If a private right of action would conflict with the statutory scheme in the case of private programs receiving federal financial assistance, precisely the same considerations apply in the case of state programs. Congress applied the same policy and the same administrative procedures to all programs receiving federal financial assistance, state and private.[13]

effectively implemented and not violated. (Br. p. 16). Indeed, there are limits that this Court would tolerate in the power of Congress to restrict the remedy for civil rights violations to agency action and judicial review—even if Congress were to impose such limits expressly.

Title VI and Title IX unquestionably include constitutional violations. Since both laws expressly subject all covered programs to the same policy and the same statutory scheme, this Court should not infer any limitation on a private right of action under either Title that it would not be willing to tolerate in a case involving the clearest possible constitutional overlap. Otherwise, in such a case, this Court would be constrained to decide the constitutional question where statutory grounds could be dispositive.

[13] The schools' brief implies that the finding they are not within the purview of section 1983 is not challenged in the Petition. (Jt.Br. pp. 4-5). Such finding is challenged under *Conley* to the extent that the state action distinction is valid. (Pet.Cert. pp. 13-14; Br. pp. 17-18). Petitioner contends it is not. However, if the schools' theory that Title VI or Title IX may be enforced under pendant jurisdiction once federal jurisdiction has been established on some other grounds such as state action under 42 U.S.C. § 1983 is correct, the explicit allowance of private actions in the recent amendment of the Age Discrimination Act of 1975 in P.L. 95-602 has quite likely rendered this case moot in

By utilizing the state action distinction for *Lau*, the schools do not even purport to argue for an implicit exception of Title VI under section 1983, even to the extent that the statute and the regulations thereunder may go beyond the Constitution.[14] But without such an exception they cannot sustain their argument based upon the statutory scheme. The identical scheme cannot mean one thing in the case of state schools and something else in the case of other schools receiving federal financial assistance.

The schools would have the Court rewrite section 1 of Title VI and its progeny, including section 1 of Title IX, by inserting an exception for programs operated by recipients of federal funds whose conduct does not constitute state action subject to 42 U.S.C. § 1983. They also would have the Court rewrite section 2 to provide that agency action should apply to any program receiving federal financial assistance, notwithstanding the exception they suggest for section 1. This, of course, is what the statute does not provide as confirmed by section 5, 42 U.S.C. § 2000d-4, and what the legislative history shows Congress pointedly refused to do.[15]

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the schools' view because petitioner may now bring an age action against them and utilize pendant jurisdiction for her Title IX claim involved here. Amendment of the present complaints to the same effect also would appear to be available to moot the question presented—in their view of the prior cases.

[14] See, *Washington* v. *Davis, 426 U.S. 229 (1976)*, *Village of Arlington Heights* v. *Metropolitan District Housing Authority*, 429 U.S. 252 (1977) as well as *Lau* itself.

[15] The National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, cited by the schools (Jt.Br. p. 19) does not present the same setting for application of the maxim, "*expressio unius est exclusio alterius*"—expression of the one is an exclusion of the other. Section 10 of NLRA contemplates administrative procedures specifically designed to enforce the individual rights protected in the legislation. Titles VI and IX do not. Recently this was confirmed after a hearing on this issue in *Price, supra.* The individual victim of alleged discrimination is not a party to the agency proceedings under Title VI

Excerpts from the legislative history offered by the schools (Jt.Br. pp. 23-28) to support the contention that section 2 of Title VI was designed to provide the sole means of enforcement for the policy stated in section 1, fail to include the other statements and actions which reveal the out-of-context nature of the comments presented. The quotations presented correctly reflect that section 2 was designed to implement the policy of section 1. However, they suggest (but do not state because no member of Congress stated) that section 2 was to provide the sole means of enforcement for the national policy expressed in terms of the rights of individuals in section 1. This is misleading.

For example, after Senator Dowdy observed that,

> "The Constitution requires that citizens of the United States be treated as citizens of the United States." 110 Cong. Rec. 5254.

and Senator Talmadge stated,

> "That right is enforceable in every court and the Senator from Minnesota knows it." *Id.*

Senator Humphrey responded.

> "That is correct. The existing law of the land is stated in section 601. Sections 602 and 603 of H.R. 7152 do not represent an extension of the law. Those latter sections represent no new power. They represent a *limitation on*

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or Title IX, 45 C.F.R. § 81.23 and is, at best, an *amicus curiae*, 45 C.F.R. § 81.22(a). The schools themselves recognize the point. (Jt.Br. p. 20).

Similarly, *Goldman* v. *First Federal Savings & Loan Assn. of Wilmette*, 518 F.2d 1247 (7th Cir. 1975) involved regulations adequately designed to effect the statutory policy. *Santa Clara Pueblo* v. *Martinez*, 98 S. Ct. 1670 (1978) is totally inapposite since it was based upon the policy of minimal incursions on tribal sovereignty, a policy unique to Indian relationships. The employment considerations raised by an *amicus curiae* (Br. Eq. Emp. Advisory Council) also are not present in this case.

the power of an affected agency to enforce existing powers . . . ." *Id.* (emphasis added).

Senator Talmadge continued,

> "The people have the authority to go to court, and the Senator admits that they have that right." *Id.*

and Senator Humphrey responded without equivocation,

> "Yes." *Id.*

There followed extended debate in which, ironically in the circumstances of this case, the opponents of the bill which became Title VI stressed their concern that because the exclusion of federal financial assistance by way of a contract of insurance or guaranty in section 602 did not limit section 601, Title VI could be used as a statutory authorization for an *executive* open housing or hiring order applicable to any individual homeowner with an FHA mortgage or individual farmer with crop support. Senators Humphrey and Pastore tried to discourage further amendment of the bill while carefully avoiding misstatement. Senator Case insisted upon maintaining a clear record that,

> "the words and provisions of section 601 and the substantive rights established and stated in that section are not limited by the limiting words of section 602." 110 Cong, Rec. 5255, and
>
> "For myself, I would not be satisfied if this language in section 602 is intended to limit existing rights of individuals under the Constitution, *or to limit the rights expressed in section 601* in any substantial sense. . . ." 110 Cong. Rec. 5256 (emphasis added).

Senator Humphrey replied,

> "I thoroughly agree with the Senator insofar as the *individual* is concerned. . . . *There would be no limitation on the individual.* The limitation would be on the qualification of the Federal agencies." *Id.* (emphasis added).

Later, when Senator Long proposed an amendment to make it clear that Section 601 did not apply to *executive* action under contracts of insurance or guaranty, Senator Pastore opposed that amendment (which was designed to confirm the proposition which the schools urge that he supported) by stating,

> "If we were to add the words that are suggested by the Senator from Louisiana, as a matter of policy, we would say in effect, "But if it is a contract or guarantee, as a national policy, you can discriminate." This section states a policy of non-discrimination. But by the proposed exception, we would create a policy of discrimination." 110 Cong. Rec. 13437.

and further,

> "Section 601 is a statement against discrimination, not to create an exception in favor of it. I have nothing else to say." *Id.*

Senator Keating concurred,

> "All that is necessary is to read section 601. The proposed amendment is absolutely and unquestionably unconstitutional. We cannot say that it shall be national policy under the Constitution to discriminate.
>
> "Section 602 is entirely different. One can make a loan from the U.S. Government, *and the Federal agency is limited* in what it can do under section 602. But to write into the bill affirmative legislation that there is a national policy to discriminate is not only immoral and wrong; in my judgment, it is clearly unconstitutional." *Id.* (emphasis added).

Senator Dirksen concurred,

> "The Senator from New Jersey [Sen. Case] is eminently correct when he states that [the Long amendment] is an invasion of a constitutional right." 110 Cong. Rec. 13438.

Senator Gore then expressed hope that the managers of the bill would come forward with acceptable language to prevent section 601 from providing "a statutory authorization for an open-housing *Executive* order." *Id.* (emphasis added). Senator Humphrey responded,

> "We shall do so if the Senator will give us a moment."

Id.

Whereupon, Senator Long withdrew his amendment. Thus, the schools' attempt to suggest that section 602 was intended to limit individual rights under section 601 is unfounded and expressly contradicted in the legislative history of Title VI.[16]

Ultimately, of course, a new section 605 provided the legislative compromise for supporters of Title VI, including each member of Congress quoted by the schools, who had specifically refused to permit limitation of the non-discrimination policy of section 601, and, for opponents who not only recognized but took the lead in pointing out that section 602 does *not* limit section 601. Section 605 provides,

> "Nothing in this subchapter shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty." 42 U.S.C. § 2000d-4.

The negative implication is clear. With respect to federal financial assistance extended in any other manner, such as the cash grants received by both respondent schools, Title VI does indeed "add to or detract from" existing authority. That it might "detract from" existing authority would have been outrageous in the situation sense of the Civil Rights Act of

[16] In presenting the discussion between Senators Bayh and Dominick on Title IX enforcement (Jt.Br. p. 20) the schools similarly neglect to point out that fund cutoff was the only agency procedure which *required* hearings.

1964.[17] Accordingly, Title VI itself plainly stated that it "adds to" existing authority with respect to any program or activity under which federal financial assistance is extended other than by way of a contract of insurance or guaranty. The identical provision was carried forward into Title IX, 20 U.S.C. § 1685.

With respect to the legislative history of Title VI presented in the schools' brief, two other statements require clarification.

First, the suggestion that "an earlier version of the bill provid[ed] for an independent right of action," (Jt. Br. p. 24 n. 17) is presented as a note to comment on "a private right of action." This is misleading in two respects: (i) the "private right of action" referred to was in Senator Keating's observation that he had urged such a right of action with respect to *fund cutoff* without success, 110 Cong. Rec. 7065, and (ii) the "independent right of action" noted in connection therewith was an *agency* right of action. Both the majority report and the minority report cited by the schools, House Report No. 914, 88th Cong., 1st Sess. p. 86, expressly recognized that deletion of the clause involved no substantive change whatever because

[17] Notwithstanding the schools' assertion that petitioner's comparable statement with respect to the exemption of any program receiving federal financial assistance from a private right of action (Br. p. 16) is "pejorative" (Jt.Br. p. 22 n. 16), no such form of language is involved. The force of petitioner's arguments based upon the situation sense of the 1964 Act both here and in her main brief lies in their historical accuracy and not in the use of any pejorative language.

The schools further suggest that subsequent congressional confirmations of the understanding that a private right of action is implicit in the policy of Title VI and Title IX may be disregarded because they do not reflect the intent of Congress in 1964 and 1972, respectively, is unfounded and, in the case of Title IX just plain wrong. Court actions by individuals frequently were noted with approval in the history of the 1964 Act and, in section 712 of the 1972 law which included Title IX, P.L. 92-318, Congress concurrently and expressly recognized and provided attorney's fees for certain private suits under Title VI, 20 U.S.C. § 1617.

such an action was only one means already covered by the clause providing for enforcement "by any other means" than fund cutoff.

Second, the schools incorrectly state that, "Only Title VI of the non-discrimination Titles [of the Civil Rights Act of 1964] fails to provide a private right of action." (Jt. Br. p. 7). On the contrary, only Titles II and VII, 42 U.S.C. §§ 2000a *et seq.*, 2000e *et seq.*, involving privately owned accommodations and private employment, expressly provide a private right of action. Titles I, III and IV, 42 U.S.C. §§ 1971, 2000b *et seq.*, 2000c *et seq.*, involving governmental action, funds or facilities, clearly, indeed "expressly", assume that a private right of action is implicit, just as petitioner and the federal respondents urge that Title VI, involving federal financial assistance, implies a private right of action to the extent that such a right of action is not expressly authorized in 42 U.S.C. § 1983.

Clearly, Titles I, III, IV and VI all apply to many state programs or activities for which a private right of action is authorized by section 1983. However, they are not all limited to such state action. Title IV, for example, expressly covers schools supported predominantly by "governmental" funds —state, federal or both.[18] It would be quite odd and unseemly for Congress to require expressly in Title IV that the Attorney General *inter alia* first determine and certify that private parties are unable to maintain appropriate legal action before he may act on their behalf and then, silently, limit enforcement of the non-discrimination policy of Title VI for the use of federal funds (other than by the "last resort" of fund cutoff) to suits by public authorities, the Attorney General or the agency.

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[18] The schools' suggestion (Jt.Br. p. 28) that Senator Ribicoff meant to confine agency enforcement "by any other means" than fund cutoff to action under Title IV (not VI) neglects to point out that the Senator gave that as only one example of such enforcement. The very next example he gave was specific judicial enforcement of contractual assurances such as those given by each respondent school to obtain federal funds under Title VI. 110 Cong. Rec. 7066.

It would have been inappropriate for Congress to limit federal judicial enforcement of statutes, regulations and contractual assurances related to federal financial assistance upon the presence of absence of state action. To infer such a procedure without an explicit mandate is incongruous. For Congress to have precluded judicial action in the case of recipients whose actions constitute governmental action, in many cases, would have been unconstitutional under Article III as well as the Fifth and Fourteenth Amendments.

3. Commentary on subsequent congressional actions avoids petitioner's argument.

Recent amendments of the Rehabilitation Act and the Age Discrimination Act confirmed petitioner's argument. Since the filing of petitioner's brief, Congress amended two of the laws relied upon by petitioner to confirm the view that Title IX and other laws patterned on Title VI imply a private right of action (Br. pp. 6-7, 9-10, 13-17) in accordance with the principle stated in the opinion of this Court in *Cort* v. *Ash,* 422 U.S. 66, (1974). Where "it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to create a private cause of action". 422 U.S. at 82. Title VI, like Title IX, section 504 of the Rehabilitation Act, and the Age Discrimination Act of 1975, each grant rights with the language "No person in the United States shall . . . be excluded . . . "[19]

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[19] The principle is grounded in constitutional law on *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137 (1803), and, in common law, on the legal maxim set out in the very first volume of Term Reports from the King's Bench—"*Ubi jus, ibi remedium.*"—Where there is a legal right, there is a legal remedy. 1 Term R. 512. (Durnford & East's Reports), Black's Law Dictionary (Rev. 4th Ed.). In primitive law the rule was said to be the reverse. Petitioner suggests that may not have been so much of a rule as an observation comparable to this Court's observation in *Allen* v. *State of Board of Elections,* 393 U.S. 544 (1969) that unless private persons may sue, the statutory guarantee might "prove an empty promise." 393 U.S. at 557.

The application of *Cort* is clear. In P.L. 95-478, the Age Discrimination Act was amended, 42 U.S.C. § 610(e), (f), to repeal the express limitation of enforcement to administrative procedures, to require a specified notice for private actions, to provide attorneys fees for such actions, and to define the "exhaustion" of administrative remedies comparable to the requirements of Title VII of the Civil Rights Act of 1964. As claimed by petitioner on the basis of *Cort,* Congress assumed that a private right of action was implicit in the statutory policy patterned on Title VI absent *express* negation. (Br. pp. 6-7, 10). No express authorization of a private right of action is contained in the amended act—merely the unequivocal, indeed "express", assumption urged by petitioner.

Senator Cranston and Senator Bayh reviewed and confirmed the basis for implication of a private right of action for which the attorney's fees were being provided. 124 Cong. Rec. (daily ed. Sept. 20, 1978) S.15590-91, 15593. Continued rejection of a private right of action under Title IX would lead inexorably to the conclusion that Congress was more concerned about effective enforcement of its prohibition of age discrimination than about effective enforcement of its earlier prohibitions of race, gender and handicap discrimination in federally assisted programs. Yet the age legislation was plainly and avowedly based on the prior legislation.

In P.L. 95-602, the Rehabilitation Act also was amended to provide for attorney's fees on substantially the same terms

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With his sharply illustrative humor, A. P. Herbert stated the rule as follows: "If Parliment does not mean what it says it must say so." *Rex* v. *Minister For Drains,* "Uncommon Law" p. 313 (Methuen & Co. Ltd., London, Ninth reprint 1959). Recently, in *Price* v. *Yale University,* Civ. No. N-77-277, (D. Conn. Dec. 6, 1978) the trial court confirmed its ruling that a private right of action is implicit under Title IX, specifically based upon the finding, after hearing, that administrative enforcement by HEW under section 902 is not designed to provide, and is not capable of guaranteeing, proper protection, of the rights afforded to each "person" by section 901.

that the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, provided for the legislation, including Title VI and Title IX, specified therein. This 1978 amendment again confirmed the prior legislative history reflecting that statutory policy language patterned on Title VI and Title IX contemplated comparable individual enforcement.

The schools also argue that the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. § 1988, established that the Act did not create any new private right of action. Petitioner agrees. She never has claimed otherwise. Petitioner claimed that the specific inclusion of Title VI and Title IX in the Act confirmed the earlier congressional declaration that such laws already "permit a judicial remedy through a private action." (Br. pp. 6, 10).

The bipartisan leadership reports reflected both the express understanding that a private action already was permitted under Title VI and Title IX and the express disclaimer of intent to create any new right of action.[20] Both thoughts are fully compatible and simply do not conflict as the schools insist. To argue the contrary is to assert that the reports of the leadership were openly and expressly inconsistent. Logic certainly does not require any inconsistency as the schools suggest.

Senator Kennedy's report specifically declared that amendment of the bill to include Title IX would avoid cost limitation of private enforcement by reason of the state action circumstances involved in *Lau.*[21] Section 1983 already had been included in the original version of the bill. Subsequent addition of Title VI and Title IX would have been meaningless if Congress believed that private enforcement thereof either was

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[20] 122 Cong. Rec. (Daily ed. Sept. 21, 1976) S.16251 report of Sen. H. Scott, S.16252 report of Sen. Kennedy, and (daily ed. Oct. 1, 1976) H.12150 *et. seq.* introduction by Reps. Anderson and Drinan and H.12159-60 report of Rep. Drinan.

[21] 122 Cong. Rec. (daily ed. Sept. 21, 1976) S.16252.

not permitted or was limited to state action programs as the schools suggest.[22] As stated in *Brown* v. *General Services Administration,* 425 U.S. 820 (1976),

> "The relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was."

Mere awareness that the original decision in this case had raised a question as to the existence of private actions under Title VI and Title IX does not indicate that Congress agreed with the court below.[23] In fact, enactment of the law notwithstanding an awareness of such decision indicates exactly the opposite. The terms of the Act itself, as well as the leadership reports and the remarks of virtually every congressman who spoke on the bill, confirm the congressional understanding that a private action already was permitted under both laws. The 1978 amendments providing attorney's fees for actions under the Rehabilitation Act and Age Discrimination Act again confirmed that congressional understanding.[24] (Br. pp. 9-10 n. 5).

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[22] Title IX was added through extraordinary procedures involving cloture of a Senate fillibuster in the closing days of an election year Congress.

[23] The Senate apparently was unaware of the decision rendered only 25 days before it began final action. Even in the House, Rep. Railsback, in referring to this case by name, indicated no awareness that the basis for the decision had been the asserted inconsistency of private actions with congressional intent. He conceded only that he was informed "there exists a serious question". 122 Cong. Rec. (daily ed. Oct. 1, 1976) H.12161. His remark would be a gross understatement by anyone familiar with the decision below.

[24] Since judicial review under section 3 of both Title VI and Title IX can be meaningful only with respect to parties to the agency proceedings and the individual victim of discrimination is not a party in the agency hearing, 45 C.F.R. § 81.23, the schools' argument (Jt.Br. p. 43) that the law was directed to fees in post administrative judicial review actions suggests that the Act properly might be renamed—in their view—as the "Civil Rights *Defense* Attorney's Fees Awards Act of 1976." This suggestion clashes with the most cursory reading of the statute and its history.

In connection with the 1978 amendment of the Age Discrimination in Employment Act of 1975, P.L. 95-478, to permit private actions and to provide attorney's fees to encourage such actions, Senators Bayh and Cranston removed any doubt as to the congressional perceptions on which all such legislation was founded. 124 Cong. Rec. (daily ed. Sept. 20, 1978) S.15590-91, 15593.

4. The state action distinction of prior decisions conflicts with the analysis of the statutory scheme and two basic doctrines of this Court.

Much of petitioner's reply appropriate to the schools' argument distinguishing prior decisions, including *Lau* and *Bakke,* as state action cases already has been made above in replying to their opposite argument based on the statutory scheme. *Bakke* presented a unique exception to prove the rule. Four Justices decided solely on the basis of the statute and five Justices, differing on the result, agreed that so-called "reverse" application of the statute "goes no further" than the Constitution itself. Eight Justices decided or assumed that Title VI permitted a private right of action. In *Lau* all opinions for the unanimous Court relied upon the statute, the guidelines or the federal funding contract and not upon the Constitution. (Br. pp. 19-20).

The schools' brief claims that jurisdiction in such cases was based on 42 U.S.C. § 1983. However, section 1983 is not a jurisdictional statute. *Blue* v. *Craig,* 505 F.2d 830 (4th Cir. 1974). The related jurisdictional statute is 28 U.S.C. §1343(3). Jurisdiction is conferred on the federal courts just as clearly by 28 U.S.C. § 1343(4) in non-state action civil rights cases under Title VI or Title IX.

The schools' argument that this Court enforced Title VI and the HEW regulations in *Lau* on the basis of some form of jurisdiction pendant to that established under section 1983

conflicts with their views of the statutory scheme. There they assert Congress evidenced its intention that administrative action followed by judicial review should be the exclusive remedy.

If the schools' distinction of prior decisions, including *Lau* and *Bakke*, as state action cases under section 1983 is correct, a private action cannot be in conflict with the statutory scheme of Title VI or Title IX. The prior decisions of this Court then require the implication of a private right of action under the four factor analysis articulated in *Cort*. The identical statutory scheme cannot mean one thing in the case of state programs and something else in the case of other programs receiving federal financial assistance.[25]

5. Doctrines of primary jurisdiction and exhaustion do not apply to a remedy which is not available.

The record establishes beyond dispute that federal administrative enforcement, if exclusive, has been unreasonably delayed or withheld in violation of 5 U.S.C. § 706. Delay of over 3½ years without so much as preliminary findings is acknowledged by all parties. Such delay of an exclusive remedy for violation of national policy is unreasonable even without reference to *Conley*.

Accordingly, the decisions of this Court in *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969) and *Rosado* v. *Wyman*, 397 U.S. 397 (1970) as well as the related decision of the Seventh Circuit in *Lloyd* v. *RTA*, 548 F.2d 1277 (7th Cir. 1977), require the judicial remedy sought by petitioner and

[25] The reasons offered by the schools for the necessity of *prior* agency action (pp. 33-38), particularly the litany of quotations from the Congressional Record (Jt. Br. p. 35), are absurd when qualified by an exception for state programs.

supported by the federal respondents.[26] The doctrines of primary jurisdiction and exhaustion relied upon by the university respondents (Jr.Br. pp. 33-38) do not apply where meaningful administrative action may, but need not, be provided by the relevant agency or official. *Levers* v. *Anderson*, 326 U.S. 219 (1945). Delay of equitable relief until application has been made for the potential administrative relief is the limit of those doctrines in such circumstances. *U.S.* v. *Abilene & So. Ry. Co.*, 265 U.S. 274 (1924), *Crawford* v. *University of North Carolina*, 440 F. Supp. 1047 (M.D.N.C. 1977), *Mendoza* v. *Levine*, 412 F. Supp. 1105 (S.D. N.Y. 1976).

CONCLUSION

The importance and substantiality of the question presented in the Petition has not been denied by the university respondents. The only claim is that a judicial remedy may be premature. But judicial action cannot be premature where, as here, the alleged necessity of following further administrative proceedings plainly conflicts with the absence of such proceedings for almost four years. Such circumstance, in and of itself, justifies reversal.

In light of the schools' agreement with petitioner that she should have a judicial remedy for unreasonable delay against HEW and the agreement of HEW with petitioner that she should have a judicial remedy against the schools, the need for reversal of the action below is indisputable. No party has urged that petitioner should continue without any remedy at this late date.

[26] The schools' asserted distinction of *Lloyd* (Jt.Br. pp. 34, 40-41) overlooks that the time delay here involved is even greater and under an identical regulatory situation. Moreover, *Lloyd* expressly left open the question of limiting judicial action to post administrative review of agency action as "premature". 548 F.2d at 1286 n. 89. *Cf. Price* v. *Yale University, supra*.

For the foregoing reasons, the judgment of the Seventh Circuit should be reversed.

Respectfully submitted,

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APPENDIX

Table of Applicant—Acceptance Statistics

Overall GPA (and Letter Grades)	MCAT Science Subtest Scores					
	Lower Scores			Higher Scores		
	200s	300s	400s	500s	600s	700s
Higher Grades	Quadrant II			Quadrant I		
3.8-4.0 (A)	0/1	4/15	55/101	442/586	933/1,047	278/292
3.4-3.7 (A- & B+)	1/5	32/110	317/791	1,964/3,162	2,429/3,167	432/496
3.0-3.3 (B)	1/17	57/338	338/1,931	1,550/4,948	1,602/3,332	196/307
Lower Grades	Quadrant III			Quadrant IV		
2.6-2.9 (B- & C+)	3/36	58/540	227/1,965	548/3,294	348/1,511	53/131
2.0-2.5 (C)	2/90	60/716	196/1,449	196/1,389	88/576	9/30
0.0-1.9 (below C)	1/16	10/112	11/115	6/54	4/18	0/0

Figure 1

Distribution of applicants and acceptees by undergraduate college grade-point average (GPA) and by scores on the Science subtest of the Medical College Admission Test MCAT) for the 1973-74 entering class. Numerator in each cell is number of acceptees with indicated grades and MCAT scores; denominator is number of applicants with these characteristics.

Source: Association of American Medical Colleges. Petitioner's overall GPA was 3.63 and her MCAT science subtest score was 585. (App. pp. 6-7).